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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

MAY DEPARTMENT STORES COMPANY,
Doing Business as FAMOUS-BARR
COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 971. 39

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

REPLY BRIEF.

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ERRONEOUS STATEMENTS IN BRIEF FOR THE BOARD.

There are many erroneous statements contained in the brief for the National Labor Relations Board, in opposition to the Petition for Writ of Certiorari in this case, such as the following:

On page 7 of the brief for the Board it is said a number of employees had signed cards which ran to a local and that the Board found that the Joint Council represents its local affiliates in collective bargaining, and there is a reference

to the Decision and Direction of Election issued by the Board (R. 1, 11). On the contrary, the Board found that the Joint Council had membership, and presumably substantial membership, among the employees in the unit. This finding was directly contrary to the evidence (Tr. 1 [11]).

On pages 9 and 10 of the brief for the Board it is said that the Petitioner advised the National War Labor Board with respect to the employees in the unit "in the event that the Union should object to the inclusion of the bushelling employees, the application should be considered amended so as to include them." The letter which was in evidence (Tr. 2 [187-188]) shows the Petitioner stated clearly to the National War Labor Board that in the event the Union should object to the inclusion of the employees of Departments 280 and 281, then they should be **excluded.**

On page 10 of the brief for the Board reference is made to the filing of the Union's Charge on September 3, 1943, and again they neglect to say that Petitioner had no knowledge of such Charge until the Complaint was issued on September 23, 1943 (Tr. 1 [35]).

On page 11 and also on page 15 of the brief for the Board references are made to paragraph 1 (b) of the Board's order, and it is said that the Petitioner was ordered to cease and desist from "in any manner interfering with, restraining or coercing its employees," etc. The order of the Board (Tr. 1 [53]) actually ordered the petitioner to cease and desist from "in any **other** manner interfering with, restraining or coercing its employees." This is significant because the order contains no prohibition of, or reference to, any specific act of interference, restraint or coercion.

On page 14 of the brief for the Board there is a quotation of a definition of the term "duly recognized collective bargaining agent" from the present Regulations of the National War Labor Board. This is in connection with

an argument relating to Petitioner's application for approval of the $2 per week storewide salary increase filed August 31, 1943, but they neglect to say that the quoted definition did not appear in the Regulations of the War Labor Board until October, 1943. At the time Petitioner's application was filed it was required only to notify the Board of the existence of "a duly recognized collective bargaining agent." It was not until October, 1943, that the War Labor Board required also notice of a union which had been certified by the National Labor Relations Board, whether or not it had been recognized. Nevertheless, Petitioner did advise the National War Labor Board of all the facts relating to the certification of the Joint Council in this case and stated its willingness to include or exclude the employees in departments 280 and 281 at the option of the Joint Council.

ERRONEOUS LEGAL CONCLUSIONS IN BRIEF FOR THE BOARD.

(1) The argument numbered 1 in the brief for the Board is based upon a completely erroneous conception of the question involved. Regarding the case of **Medo Photo Supply Corp. v. National Labor Relations Board**, 321 U. S. 678, it is said on page 12 of the brief for the Board: "The Court explicitly held that 'negotiations by (the employer) for wage increases with any one other than the Union, the designated representative of the employees, was an unfair labor practice.'" But that is irrelevant here. In this case there were no negotiations by the Petitioner with any one. The Petitioner merely sought approval of the War Labor Board to grant a voluntary $2 per week salary increase to substantially all its employees.

In the Medo Photo Supply Corp. case there were direct negotiations between the employer and the employees, and the Court held that (1) the direct negotiations with the

employees when they were represented by the union was an unfair labor practice, and (2) "it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union." The Court considered the petitioner's contention that the wage increase was not conditioned upon the employees' leaving the Union, and presumably would have considered that a complete defense but held that there was substantial evidence to support the Board's finding that the wage increase was conditioned upon the employees' leaving the union.

In the brief for the Board here reliance is placed upon the holding in the Medo Photo Supply Corp. case with respect to direct negotiations, but that has nothing to do with this case, because there were no such negotiations. The decision of the Court below in this case is in conflict with the decision of this Court in the Medo Photo Supply Corp. case with respect to the holding that the granting of a wage increase was an unfair labor practice only because it was conditioned upon the employees' leaving the Union. In the brief for the Board no attempt is made to discuss that conflict.

On page 14 of the brief for the Board it is said that the Union might risk losing its members if it failed to object to the wage increase which the Petitioner proposed to grant. It is absurd to say that a union representing 30 people would gain or lose any credit by reason of the Petitioner's granting a voluntary storewide increase to its more than 4,500 employees.

(2) On page 15 of the brief for the Board reference is made to the asserted conflict of the decision of the Court below with the decision of this Court in **National Labor Relations Board v. Express Publishing Co.**, 312 U. S. 426, and it is said that the Petitioner's argument "is apparently based upon the erroneous assumption that the Board

could not properly find that the Petitioner's unilateral action with respect to the wage increase was a direct violation of Section 8 (1) of the Act." This is not a correct statement of Petitioner's position. In the Petitioner's brief on page 20 we said clearly that, assuming for the sake of argument that two distinct unfair labor practices, (1) refusal to bargain and (2) the granting of the storewide salary increase, had been correctly found by the Board and sustained by the Court, there is still no justification for the the broad language contained in paragraph 1 (b) of the order. And the conflict with the decision of this Court in the Express Publishing Company case is not affected by the question of whether or not the granting of the salary increase was an unfair labor practice. In the Express Publishing Company case this Court said:

> "It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

In this case, even assuming that the granting of the salary increase was an unfair labor practice, the employer's conduct amounts to no more than availing itself of the statutory right to judicial review of the Board's decision relating to a unit of 30 employees and, pending such review, filing an application with the War Labor Board for approval of a storewide $2 per week salary increase for more than 4,500 employees in which it was willing either to include or exclude the 30 employees as the Union might elect. Certainly that conduct would not persuasively be related to "in any other manner interfering with, restraining, or coering its employees in the exercise of their right to self-organization."

The conflict of the decision below with the decision of this Court in the Express Publishing Company case is apparent whether or not the granting of the salary increase should be held to be an unfair labor practice.

In the brief for the Board it is said that this Court and several Circuit Courts of Appeals, including the Third, Seventh and Ninth Circuits, have enforced provisions identical with paragraph 1 (b) of the order involved here. In none of the three cited cases decided by this Court, N. L. R. B. v. Automotive Maintenance Machinery Co., 315 U. S. 282; N. L. R. B. v. Electric Vacuum Cleaner Co., 315 U. S. 685, and N. L. R. B. v. Nevada Consolidated Copper Corp., 316 U. S. 105, is there any mention of a provision similar to paragraph 1 (b) of the order involved here. In several of the cited cases decided by other Circuit Courts of Appeals there is no mention of any such provision and not one of the cases is in point. The decision in the Express Publishing Company case recognized that under certain circumstances a broad order could be issued where the past conduct of the employer showed a threat of continued and varied violations. Such circumstances were present in some of the cases cited in the brief for the Board, but those cases are not in conflict with the decision of this Court in the Express Publishing Company case. In that case this Court said:

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed, or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

In this case there is no claim, and there could be no claim, that interference, restraint and coercion of its employees by Petitioner "is to be anticipated from the course of his conduct in the past."

(3) The argument on pages 19 and 20 of the brief for the Board, with relation to the unit, ignores completely the fact shown by the record that the Union's petition for this unit was not filed for the benefit of the employees in the unit, but only as a part of the store-wide campaign, in which the Union said:

> "This is the first of a series of election petitions for various groups of employees. Others will follow shortly. * * * Remember. This new plan in no way conflicts with our final goal of a 100% Union store.[0] We believe this new approach may do the job faster. * * * By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one union in the store" (Int. Ex. 11, Tr. p. 2 [133]). "Where we will petition next depends upon only one thing. That is which group is ready next" (Int. Ex. 12, Tr. p. 2 [139]).

That is not the "extent of organization" principle recognized by this Court in the case of National Labor Relations Board v. Hearst Publications, 322 U. S. 111, in which this Court said:

> "No plausible reason is suggested for withholding the benefits of the Act from those here seeking it until a group of geographically separated employees becomes interested in collective bargaining."

This is a case where one of two unions competing in store-wide organization campaigns and having substantial membership throughout the store (Tr. pp. 1 [7, 8], 2 [11]) is seeking to gain an advantage in reaching the ultimate goal of both unions to organize all the employees in one store-wide unit by a series of election petitions in units determined on a basis of expediency.

Perhaps we should call attention also to the fact that these 30 employees are not "bushelmen" in the technical

sense, but are alteration employees in a retail store and include fitters, markers, tailors, tailoresses, finishers, pressers, machine operators, examiners and rippers. And employees doing the same work are engaged in altering women's clothing (Tr. p. 2 [54]).

(4) It is indeed surprising that it should be said on page 23 of the brief for the Board that the arbitrary and wholly unwarranted action of the Board in making and publishing a finding contrary to the facts shown by the record, and which it should be presumed influenced the result of the election, is not a matter of general importance in the administration of the Act.

CONCLUSION.

It is respectfully submitted that the decision of the Court below is in conflict with applicable decisions of this Court and is in conflict with decisions of other Circuit Courts of Appeals and that the Court below has decided important questions of federal law which have not been, but should be, settled by this Court and that this case should be reviewed by this Court.

Respectfully submitted,

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